

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT COFFEY,

Petitioner,

-v-

9:21-CV-454

JAIFA COLLADO,
Superintendent of
Shawangunk Correctional
Facility,

Respondent.

APPEARANCES:

OF COUNSEL:

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PAUL B. LYONS, ESQ.
Ass't Attorney General

DAVID N. HURD
United States District Judge

ORDER ON REPORT & RECOMMENDATION

On April 22, 2021, petitioner Robert Coffey ("petitioner") filed this action seeking habeas corpus relief pursuant to 28 U.S.C. § 2254. Dkt. No. 1. After

the Court directed respondent to answer the petition, Dkt. No. 4, respondent sought and received permission to file a motion to dismiss the petition as untimely, Dkt. Nos. 8, 9. That motion was fully briefed. Dkt. Nos. 15, 16.

On December 7, 2021, U.S. Magistrate Judge Christian F. Hummel advised by Report & Recommendation (“R&R”) that respondent’s motion to dismiss be granted and that the petition be denied and dismissed as untimely. Dkt. No. 26. Petitioner has filed objections. Dkt. No. 29.

As an initial matter, however, petitioner’s counsel also filed a notice of appeal from the R&R even though it remains pending before this Court. Dkt. Nos. 30, 32. Ordinarily, a notice of appeal divests the district court of jurisdiction. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). But that rule does not apply if the appeal is frivolous, untimely, or otherwise defective. *See, e.g., China Nat’l Chartering Corp. v. Pactrans Air & Sea, Inc.*, 882 F. Supp. 2d 579, 595 (S.D.N.Y. 2012).

As relevant here, a party’s attempt to take a direct appeal from a pending R&R fits in the “otherwise defective” category—it is not an appealable final order. *See, e.g., LCS Grp., LLC v. Shire LLC*, 2019 WL 7824613, at *1 (2d Cir. Nov. 12, 2019) (refusing to exercise jurisdiction over pending report and recommendation); *Juste v. Sessions*, 2017 WL 3754208 (2d Cir. Apr. 26, 2017) (dismissing appeal *sua sponte* for want of jurisdiction where plaintiff

attempted to appeal from report and recommendation).¹ Accordingly, this Court still has jurisdiction to consider whether to adopt, modify, or reject the pending R&R.

Upon *de novo* review of the portions to which petitioner has objected, the R&R will be accepted and adopted in all respects. *See* 28 U.S.C. § 636(b)(1).

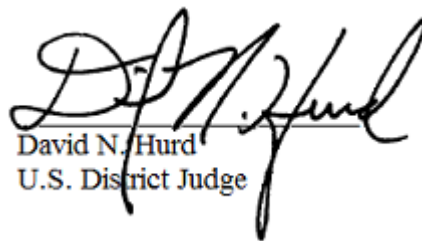
Therefore, it is

ORDERED that

1. The Report & Recommendation is ACCEPTED;
2. Respondent's motion to dismiss is GRANTED;
3. The petition is DENIED and DISMISSED;
4. No Certificate of Appealability shall issue; and
5. Any further request for a Certificate of Appealability shall be addressed to the Court of Appeals in accordance with Fed. R. App. P. 22(b).

IT IS SO ORDERED.

Dated: January 31, 2022
Utica, New York.



David N. Hurd
U.S. District Judge

¹ Recognizing as much, the Second Circuit has directed petitioner's counsel to explain the basis for jurisdiction or withdraw the appeal. Dkt. No. 34.